OHIO BOARD OF TAX APPEALS

ARAMARK CORPORATION, (et. al.),	)	
Appellant(s),	)	CASE NO(S). 2019-2975
vs.	)	
	)	(COMMERCIAL ACTIVITY TAX)
PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et. al.),	)	DECISION AND ORDER
Appellee(s).	)	

APPEARANCES:

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Entered Monday, November 6, 2023

Mr. Harbarger, Ms. Clements, and Ms. Allison concur.

Appellant Aramark Corporation ("Aramark") appeals final determinations of the Tax Commissioner rejecting refunds of commercial activity tax ("CAT") paid during the periods of July 1, 2012, through December 31, 2016. This matter is now considered upon the notice of appeal, the statutory transcript certified by the Commissioner, the record of the hearing before this Board ("H.R."), and the parties' written argument.

BACKGROUND AND PROCEDURAL HISTORY

Aramark is a food services, hospitality, facility services, and uniform services company. It provides a broad range of managed services to businesses and educational, healthcare, and government institutions. Aramark provides its services based on two types of contracts: (1) profit

and loss and (2) management fee. The primary distinction between the two arrangements is the allocation of the risk of profitability. Under a profit and loss contract, Aramark operates independently of the client, making a profit or loss based upon whether sales exceed Aramark's expenses. Under these contracts, Aramark bears the full risk of profitability and retains all register receipts. Aramark does not challenge whether the proceeds under these contracts constitute taxable receipts for purposes of CAT.

Under a management fee contract, the client bears the risk of profitability. Like in the profit and loss contracts, Aramark purchases food, supplies, and other items for the client. However, the client received the receipts from the register, reimburses Aramark for the expenses, and pays Aramark a management fee for its services. The present appeal relates only to Aramark's receipts under management fee contracts. For the periods at issue, Aramark paid CAT on receipts for all contracts and sought a refund for those it claims must be excluded because they were received as an agent and exceeded its commission or remuneration.

Aramark's Refund Claims

Aramark applied to the Department of Taxation ("the Department") for refunds, asserting that it illegally or erroneously paid tax on receipts it received as an agent that exceeded its commission or remuneration. In addition to other arguments that it no longer pursues, Aramark also claimed that amounts that do not qualify under R.C. 5751.01(F) must be excluded from taxable gross receipts. The Department denied the refunds because it determined that Aramark failed to affirmatively establish the purported agency relationships. Aramark objected to the denials and requested a hearing.

Following the hearing, the Commissioner considered all available evidence and denied the refund claims. The Commissioner determined that Aramark and its clients were engaged in a business relationship rather than an agency relationship because Aramark did not have authority to bind its clients to its suppliers if Aramark did not pay for its food purchases. The Commissioner

further found that provisions in the contracts allowed Aramark to operate without the client's actual authority regarding purchases of food and supplies. The Commissioner rejected Aramark's argument that it engaged in cost-plus contracts with its clients after applying the three-factor test laid out in Ohio Adm.Code 5703-29-13(C)(2)(c). This test sets forth the factors to consider whether an agency relationship exists between a general contractor and property owner engaged in a cost-plus contract to construct an office building for CAT. Finally, the Commissioner concluded that even if Aramark had established an agency relationship, the claimed estimated refund amounts and supporting information were too speculative to show which amounts may have been erroneously overpaid. Accordingly, the Commissioner issued a final determination denying these refund requests.

Appeal to this Board

Aramark appealed the denials of the refund requests to this Board. Aramark argued that under the facts and circumstances of this case, it has an agency relationship with its clients. It also raised constitutional arguments and incorporated the objections made during the audit and administrative review process.

Merit Hearing

This Board convened a merit hearing to allow the parties an opportunity to submit additional evidence. Aramark submitted copies of its contracts with 31 of its management fee clients, filings with the U.S. Securities and Exchange Commission, and the mathematical basis for its refund claims. In addition to these documents, Aramark presented testimony from three witnesses: Christopher Moore, the national account director for Aramark's Nationwide Insurance portfolio in business dining; David Wilson, the general manager of food services for Hilliard Schools; and Salvator Santacroce, a corporate tax supervisor at Aramark for indirect taxes. The

Commissioner presented testimony from Christopher Clemons, tax program assistant administrator for the Department, who has been involved with the CAT since its inception in 2005 and had direct involvement with the refund claim.

Moore and Wilson described their experiences with the company. They went into detail about how Aramark enters contracts with new clients and the distinctions between profit and loss contracts and management fee contracts. They each explained that the primary difference between the two contract types is the risk of loss and described the decision-making processes with respect to expiring inventory, uniforms, cafeteria naming, and menu choices for management fee contracts. They also discussed the practical effects of various contract terms and how operational decisions are made. When asked who makes the menu decisions for profit and loss contracts, Moore responded, "So again, the same general process is in play in profit and loss contract as well. Although, I will tell you that it is much less likely that the client will get themselves involved in those types of decisions in a profit and loss because, again, there's – essentially, there's no financial impact to them one way or the other." H.R. at 29.

Santacroce provided the financial data supporting the requested refunds, including a management fee calculation for each profit center in Ohio. He explained that their supporting documents come from the general ledger, and their data is audited both internally and externally because Aramark is publicly traded. Santacroce indicated that the requested reduction is not based on setting forth the total receipts deducted from the amount reported on the original return. Rather, the request is based on the total receipts after Aramark substitutes the management fee from a total that includes all reimbursed expenses.

Clemons testified about how the Department reviews agency claims. He indicated that it looks at language in the contract, performance of the parties, definitions from the revised code, and the parties' filings. Clemons stated that there are two types of agents, collection agents and purchase agents. He said that agency is more than simply acting on behalf of another and requires

the ability to financially bind the client. He asserted that oversight by the client over aspects of the service is not the same as agency for purposes of CAT. He indicated that food purchased by a taxpayer to fulfill a service contract would ordinarily be considered part of the gross receipts.

Post-Hearing Arguments

Aramark argues that under a plain reading of R.C. 5751.01(P)(2), it qualifies as an agent. It cites to *Willoughby Hills Dev. & Distrib., Inc. v. Testa*, 155 Ohio St.3d 276, 2018-Ohio-4488, 120 N.E.3d 836, attempting to distinguish the relationship in that case from that between Aramark and its clients. Aramark relies on the language in its management fee contracts, claiming that it incurs expenses on behalf of its clients and that it acts for their benefit. Aramark further maintains that the Commissioner's regulations and opinions outline factors to determine whether an agency relationship exists. In the alternative, Aramark argues that the reimbursements it received from its management fee clients must be excluded because they are not "gross receipts" under the definition in R.C. 5751.01(F).

The Commissioner argues that Aramark's refund claim fails under a plain reading of the statute because its gross receipts must be computed without a deduction for the cost of goods sold or other expenses incurred. She contends that Aramark must have "actual authority" to financially bind its clients to qualify as an "agent" for purposes of the CAT. Because no such authority is present in Aramark's contracts with its management fee clients, the Commissioner maintains that Aramark is not a qualifying agent. The Commissioner argues that the administrative code sections cited by Aramark are inapplicable. The Commissioner further asserts that even if Aramark is an "agent" of its management fee clients, the cost reimbursements are not excludable under R.C. 5751.01(F)(2)(l). The Commissioner maintains Aramark failed to provide sufficient evidence to substantiate the amount of its refund claim.

STANDARD OF REVIEW

This Board reviews the Commissioner's findings de novo, and those findings are

presumptively valid, subject to rebuttal. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14 (finding the taxpayer's burden for rebutting findings "is simply to prove that the findings were incorrect."). As we consider the law, our role is "to provide a fair reading of what the legislature has enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other." *Stingray Pressure Pumping, L.L.C. v. Harris*, Slip Opinion No. 2023-Ohio-2598, ¶ 22.

ANALYSIS

Commercial Activities Tax and the Agency Exclusion

Ohio levies the CAT on taxpayers with substantial nexus with the state for the privilege of doing business in Ohio. R.C. 5751.02. For purposes of the CAT, "gross receipts" generally include "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person." R.C. 5751.01(F). However, R.C. 5751.01(F) sets forth a number of exclusions, such as an exclusion for "[p]roperty, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration." R.C. 5751.01(F)(2)(l). For purposes of the CAT, an agent is "a person authorized by another person to act on its behalf to undertake a transaction for the other." R.C. 5751.01(P). An agent may include "[a] person retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person." R.C. 5751.01(P)(2).

The Ohio Supreme Court has observed that to qualify as an agent, a taxpayer must meet the requirements of R.C. 5751.01(P). *Willoughby Hills* at ¶ 23. In order to meet those requirements, "the person must be 'endowed with authority,'" and such authority must be linked to the activities that generate the gross receipts. *Id.* at ¶ 24, quoting *Webster's Third New International Dictionary* 147 (2002) (defining "authorized"). The Court relied on common law understandings of agency to understand its statutory meaning. *Id.* at ¶ 25, citing Scalia & Garner,

Reading Law: The Interpretation of Legal Texts 320 (2012). The Court considered its analysis of case law and the Restatement in *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929. Based on this review, it concluded that the primary question is whether the purported agent had actual authority to bind the other based on their contract. *Willoughby Hills* at ¶ 27. "'[O]ne of the most important features of the agency relationship is that *the principal itself becomes a party* to contracts that are made on its behalf by the agent' (emphasis sic), [*Cincinnati Golf Mgt.*] at ¶ 23, and 'that the agent make the contracts on the principal's behalf *with actual authority to do so*' (emphasis sic), *id.* at ¶ 24." *Willoughby Hills* at ¶ 27. The Court expressly rejected the applicability of the "control test," which considers the amount of control a principal retains over a purported agent. *Id.* at ¶ 33. The Court held that the proper focus is on whether or not the purported agent had the actual authority to bind the principal as the purchaser in the transactions at issue. *Id.*

Aramark was not Acting as an Agent for Purposes of CAT Receipts

Aramark claims that it acts as an agent that purchases food and services on behalf of its management fee clients. It asserts that these clients bear the risk of loss, maintain control over day-to-day operations, retain register receipts, own inventory, set prices, and make purchasing decisions. However, to qualify as an agent for the purposes of CAT, Aramark must show that it was doing more than making purchases to fulfill its contractual obligations to provide food services to its clients. To qualify for the exclusion from its gross receipts, Aramark must show that it was endowed with the authority to bind its client for the activities related to the activities that generated those receipts. The evidence shows that Aramark did not possess the requisite authority to qualify as an agent for purposes of CAT.

Aramark asserts that clients in the management fee contracts retain control and risk, which distinguishes this arrangement from its profit and loss contracts. Aramark's assertions relate largely to the control test, which is not the proper standard to determine whether a party is an

agent for purposes of CAT. Aramark focuses heavily on the extent to which the clients can make the final say in decisions regarding menus, pricing, and employee matters. These factors have no bearing on the Board's analysis if Aramark cannot demonstrate that it had actual authority to bind its clients.

The reimbursed expenses can generally be lumped into three categories: food, labor, and "direct." H.R. at 18. Food and labor are self-explanatory, while direct includes everything that is not food or labor, such as packaging materials or other materials necessary to produce the food service on behalf of the client. *Id.* Aramark's refund request treats each of these expense types together, excluding all reimbursements from its calculation and including only the management fee in its taxable gross receipts.

Aramark provided contracts for its management fee clients within Ohio, offering testimony to discuss agreements with two such clients in more detail, Nationwide Insurance and Hilliard City School District. The express purpose of the Nationwide Insurance agreement is to retain Aramark to provide "preparation, equipment, service and sales of food, beverages, goods, merchandise, and other items and services for [Nationwide Insurance's] associates, contractors, visitors and guests either through café, catering, vending or retail coffee shops." H.R., Ex. 20 at Section 1(A). The agreement also provides that Aramark "will be an independent contractor, and shall retain control over its personnel, suppliers, contractors and agents. Nothing in this Agreement will be deemed to create a partnership, agency, joint venture or landlord-tenant relationship between Owner and Operator." *Id.* at Section 1(B). Thus, the agreement in place demonstrates that Nationwide Insurance did not give Aramark the requisite actual authority to act as its agent. Rather, the contract shows that it hired Aramark to provide a service, and the reimbursement for fees is part of the payment arrangement between the two parties to that service agreement.

Similarly, the contract with the Hilliard City School District provides that Aramark has the exclusive right to operate the school lunch and breakfast programs for the benefit of the client's

students, faculty, and staff. H.R., Ex. 31 at 8. It provides that Aramark is an independent contractor, and its employees are not employees of the School District. *Id.* The School District retains responsibility to ensure that the programs are compliant with various agency regulations, but Aramark is required to cover certain expenses reimbursable under the terms of the contract. *Id.* at 8, 11-12. These expenses include food, labor, and the other direct expenses Aramark now seeks to exclude from its gross receipts. *Id.* at 11-12. Like the contract with Nationwide Insurance, the agreement with the School District sets forth the responsibilities of each party and compensation for Aramark for providing those services. It does not give Aramark the authority to bind the School District for its purchases for food, labor, or other direct expenses.

Furthermore, even if the control test were relevant, Aramark has not shown it qualifies as an agent under this standard. Clients undeniably retain additional control over certain decisions under management fee contracts, such as the menu, materials, or hiring practices. Under these arrangements, however, Aramark makes most decisions regarding the day-to-day operations, and does not seek approval from the client for most aspects of its operations. It allows the client the last say on certain choices, but those are consistent with the purpose of these agreements, i.e., to provide food service to the client and its customers. The decisions that are made by the client are in furtherance of this stated purpose and do not rise to the level of control that confers Aramark agency status.

Reimbursements are Gross Receipts

Aramark contends that the reimbursements it received from management fee clients are not gross receipts under R.C. 5751.01(F). It claims that those receipts do not in any way contribute to the production of gross income because they are reimbursements and do not increase or decrease the amount Aramark receives under those contracts. We reject this argument and find it illogical that repayment for the costs of goods purchased necessary to fulfill its service agreement does not contribute to the production of gross income. R.C. 5751.01(F) includes all gross receipts "without

deduction for the cost of goods sold or other expenses incurred." To exclude reimbursement for the cost of the goods sold would effectively deduct the total receipts to account for those costs, which is expressly prohibited by the statute. Accordingly, we find that those receipts are properly included for the purposes of determining Aramark's CAT liability.

Constitutional Arguments

We acknowledge that Aramark argued that the tax violates the Commerce Clause, Due Process Clause, and Equal Protection Clause of the United States Constitution. We make no findings regarding the constitutional arguments, however, as such arguments may only be addressed on appeal by a court that has the authority to decide constitutional challenges. *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 625 N.E.2d 597 (1994); *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 520 N.E.2d 188 (1988).

CONCLUSION

Based upon the foregoing, we find that Aramark has failed to demonstrate that it was acting as an agent of its clients and the reimbursements should be excluded from its CAT receipts. Accordingly, the Commissioner's final determination is affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Ms. Allison		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

Kathleen M. Crowley, Board Secretary